

SERVICE DATE – AUGUST 24, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36005

KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC—FEEDER LINE
APPLICATION—LINE OF V AND S RAILWAY, LLC, LOCATED IN CROWLEY,
PUEBLO, OTERO, AND KIOWA COUNTIES, COLORADO

Digest:¹ The Board indicates that voluntary mediation will be initiated and directs V and S Railway, LLC, to submit a verified certification regarding the inventory and condition of the rail line at issue in this case.

Decided: August 23, 2017

On March 18, 2016, KCVN, LLC (KCVN), and its wholly owned subsidiary, Colorado Pacific Railroad, LLC (Colorado Pacific) (collectively, Applicants), jointly filed an application under the feeder line provision at 49 U.S.C. § 10907 for Colorado Pacific to acquire a rail line owned by V and S Railway, LLC (V&S), in southeast Colorado (the Line). The Line consists of approximately 121.9 miles of railroad line and approximately 12 miles of other tracks and facilities, between milepost 747.5, near Towner, and milepost 869.4, near NA Junction, in Pueblo, Crowley, Kiowa, and Otero Counties, Colo.

By decision served on July 31, 2017, the Board found that the application meets the statutory criteria for a forced sale under § 10907 and that Colorado Pacific is financially responsible and thus eligible to purchase the Line. The Board requested that the parties engage in Board-sponsored mediation to resolve the net liquidation value (NLV) of the Line and directed the parties to confirm by August 15, 2017, whether they agree to do so. Thereafter, both V&S and Applicants agreed to mediation. (V&S Letter 1, Aug. 10, 2017; Applicants Letter 2, Aug. 14, 2017.)

On August 7, 2017, Applicants requested an order requiring V&S to certify, pursuant to a verified statement by an officer of the company, that the track and rail assets making up the Line and the condition of the track and rail assets “do not differ in any material respect from the list of rail assets of the Towner Line submitted by V&S in its Comments, and the condition V&S represented them to be in at that time.” (Applicants Mot. 2-3.) A difference is material, according to Applicants, if any of the listed track and rail assets have been “sold, destroyed, damaged, removed, or otherwise disposed of since August 30, 2016.” (*Id.* at 2.) Further, if V&S

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

cannot so certify, Applicants request that V&S “be directed to expeditiously submit a revised inventory of the Line that specifically identifies the differences from the August 30, 2016 inventory and a detailed explanation of the reasons for such differences.” (*Id.* at 3.) Applicants request that V&S be directed to provide this information before Board-sponsored mediation begins. (*Id.* at 3.)

Applicants argue that their request is warranted “given the passage of time since V&S’s Comments were filed, combined with V&S’s documented history of neglecting the Line and its undisputed previous attempt to sell some of the track assets at the same time it led KCVN and other parties to believe a sale of the entire Line was still possible.” (*Id.* at 2.)

V&S replied in opposition on August 10, 2017, arguing that such an order would unnecessarily require V&S to re-inspect every aspect of the Line and that there is no basis for believing there have been any material changes in the Line’s condition. (V&S Reply 2.) V&S asserts that the mere passage of time would not result in any material changes and that because the Line has been unused for the past year for anything other than car storage, there is no reason to believe that the condition of the assets would have changed materially. (*Id.*) V&S further states that it has complied with the Board’s order² prohibiting it from removing or dismantling any track or related assets on the Western Segment of the Line³ and that, because it has not obtained abandonment authority for the Eastern Segment of the Line, it has not dismantled or removed any track or related assets from that segment.⁴ (*Id.* at 3.)

Given the history of this case, it is not surprising that Applicants seek assurances that there have been no material changes in the inventory or condition of the assets on the Line since V&S submitted its evidence in August of 2016. And although V&S asserts that it has not removed any assets from the Eastern or Western Segments, those assertions are not verified and do not cover the entirety of the Line. For these reasons, it is appropriate to require V&S to provide a certification, verified by a V&S officer or employee, that will provide some additional certainty as to the present status of the assets on the Line beyond the representations in V&S’s August 10, 2017 reply.

The Board understands V&S’s concerns with being compelled to provide any certification that would effectively require V&S to substantially conduct a new inventory and classification assessment or risk later being found to have provided a false certification. It is nevertheless appropriate for V&S to certify, through a verified statement by a qualified and

² See Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. at 10 (STB served May 7, 2015).

³ The Western Segment extends between mileposts 808.3 near Haswell, Colo., and 868.5; the Eastern Segment extends between mileposts 749.5 and 787.5. KCVN, LLC—Feeder Line Application—Line of V & S Ry. Located in Crowley, Pueblo, Otero, & Kiowa Ctys., Colo., FD 36005, slip op. at 3 n.2 & 4 (STB served July 31, 2017).

⁴ V&S does not make such an express statement regarding the approximately 21-mile portion of the Line between the Eastern and Western Segments.

authorized V&S employee, that since August 30, 2016: (1) V&S (including its parents, affiliates, officers, directors, employees, contractors, or anyone acting on its behalf, at its direction, or with its permission) has not sold, removed, or otherwise disposed of any of the assets that comprise the Line, or contracted to do so, (with any exceptions that may apply); and (2) to the best of V&S's knowledge (without performing a new inspection, inventory or condition assessment), none of the assets comprising the Line have been destroyed or damaged beyond ordinary wear and tear (with any exceptions that may apply). V&S's certification will be due by September 5, 2017.

Within five days of the Board receiving V&S's certification described above, the Acting Chairman will appoint one or more Board employees to serve as mediator(s). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The parties may request to extend mediation by mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

It is ordered:

1. Voluntary mediation will be initiated as discussed above.
2. Applicants' motion to require V&S to certify that its inventory and classification evidence remains accurate is granted as modified above. By September 5, 2017, V&S shall certify, through a verified statement by a qualified and authorized V&S employee, as follows: "Since August 30, 2016: (1) V&S (including its parents, affiliates, officers, directors, employees, contractors, or anyone acting on its behalf, at its direction, or with its permission) has not sold, removed, or otherwise disposed of any of the assets that comprise the Line, or contracted to do so, [except as follows: _____]; and (2) to the best of V&S's knowledge (without performing a new inspection, inventory, or condition assessment), none of the assets comprising the Line have been destroyed or damaged beyond ordinary wear and tear [except as follows: _____]."
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.